IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION.

APPLICATION No.7 of 2005
IN
ELECTION PETITION No. 14 of 2004.

Dadaji Dagdu Bhuse. Applicant.

Vs.

Suresh Bhilla Nigam Respondent

WITH

APPLICATION No.8 of 2005
IN
ELECTION PETITION No. 15 of 2004.

Dadaji Dagdu Bhuse. Applicant.

Vs.

Deepak Lotan Desale & Ors. Respondents.

Mr. M.M. Vashi with S.M. Sabrad for Applicant. Mr. Pramod Patil with V.M. Thorat for Petitioner (In Appln. No. 7 of 2005).

Mr. M.M. Vashi i/b S.M. Sabrad for Applicant. Mr. Pramod Patil with V.M. Thorat for Petitioner. Mr. Anilkumar Patil with R. R. Gite for Respondent No.2 (In Appln.No. 8 of 2005.

CORAM: D.G. KARNIK,J.

DATED: 23RD JANUARY, 2007.

P.C.:-

1. Heard the learned counsel for the parties.

2. By these applications Dadaji Dagdu Bhuse

(hereinafter referred to as "the elected candidate") prays that Election Petitions Nos. 14 and 15 of 2004 filed against him be dismissed, or rejected be under Order 7 Rule 11 of the Code of Civil Procedure, or in the alternative paragraphs 9 to 14 in the Election Petition No. 14 of 2004 and paragraphs 5 to 11 in the Election Petition No. 15 of 2004 be struck off under Order VI Rule 16 of the Code of Civil Procedure.

3. Elections to the Dabhadi Constituency (Constituency No. 74) of the Maharashtra Legislative Assembly were held in the year 2004. Mr. Suresh Bhilla Nigam, petitioner in Election Petition No. 14 of 2004 and the elected candidate alongwith six other candidates contested the election. The elected candidate was declared elected. Petitioner in Appln.No. 7 of 2005 has filed Election Petition No. 14 of 2004 challenging the election of the elected candidate on various grounds. One voter in the Constituency has filed Election Petition No. 15 of 2004, challenging the election almost on similar grounds.

4. The challenge in both the Petitions is that on 23rd September, 2004 when the nomination papers of the elected candidate was accepted he was employed as a Junior Engineer under the State Government and was, therefore, disqualified to contest the election. In para 9 of the petition No. 14 of 2004 the petitioner has pleaded that the elected candidate suppressed in his nomination papers, as well as before the Returning Officer that he was gainfully employed, or was holding an office of profit under State Government. In para 10, it is alleged that since the elected candidate was an employee of the State Government employed in the post of a Junior Engineer in the Department of Irrigation, he was disqualified to contest the election and hold the office of an elected representative under Article 191 of the Constitution of India. In para 12 of the Election Petition, it is alleged that the respondent had submitted his resignation on 24th May, 1999, however, the same was not accepted on the date of scrutiny and was not accepted even till the date of filing of the Election Petition on

account of pendency of a departmental enquiry against the elected candidate.

5. Mr. Vashi, the learned counsel for the elected candidate submitted that in para 3 of the Election Petition, the petitioner has specifically stated that he was challenging the election of the elected candidate under Sections 100 (1) (d) (i) and (iv) of the Representation of the People Act, 1951.(for short "the R.P. Act"). The petitioner has not pleaded that the election was also challenged under Section 100 (1)(a) of the R.P. Act. He, therefore, further submitted that in order to succeed under Sections 100 (1) (d) (i) or 100 (1) (d) (iv) of the R.P. Act, the petitioner was required to plead that the result of election, in so far as it concerned the elected candidate, had been materially affected by improper acceptance of any nomination or by non-compliance of the provisions of the Constitution of India or the R.P. Act and the Rules made thereunder. He submitted that in the Election Petition the petitioner had not pleaded that the result of

the election, in so far as it concerned the elected candidate had been materially affected. He therefore submitted that election petitions are liable to be dismissed summarily.

6. In order to appreciate the submissions, it would be appropriate to quote sub section (1) of Section 100 of the R. P. Act which reads thus:-

Section 100 :- Grounds for declaring election to be void.

(1) "Subject to the provisions of sub-section (2) if the High Court is of opinion :-

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963);or

(b) that any corrupt practice has been

committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected :-

(i) by the improper acceptance or any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate (by an agent other than his election agent) or,

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this

Act."

8. Bare reading of Section 100 of the R. P. Act would show that under clause (a) of sub Section (1) the election of an elected candidate can be set aside if he was not qualified or was disqualified to be chosen to fill the seat under the Constitution of India or under the R. P. Act, 1951. This ground of disqualification under clause (a) is separate and distinct from the grounds under sub clause (i) or (iv) of clause (d) of the Act, though in some cases they may be an over lap.

9. Article 191 of the Constitution of India inter-alia says that a person shall be disqualified for being chosen as and for being a member of the Legislative Assembly or the Legislative Council of a State, if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder.

10. Sub Section 2 of Section 36 of the Act inter-alia provides that the Returning Officer shall reject any nomination paper, if on the date fixed for the scrutiny of the nomination paper any candidate is either not qualified or disqualified for being chosen to fill the seat under any of the provisions under Articles 84, 102, 173 and 191 of the Constitution of India. Thus, a person who holds the office of profit under the Central or the State Government is not only not entitled to be elected to a Member of Legislative Assembly or a Legislative Council, but his nomination paper is required to be rejected at the threshold at the time of scrutiny of the nomination papers. If his nomination as a candidate was wrongly accepted and he is elected, his election is liable to be set aside under clause (a) sub-section (1) of Section 100 of the R.P. Act.

11. It is true that the petitioner has not specifically pleaded that the elected candidate was not qualified or was disqualified to be elected as a Member of Legislative Assembly under clause (a) of sub

section (1) of Section 100 of the R. P. Act. However, it must be remembered that in any suit or proceeding the petitioner or the plaintiff is not required to plead the law, but is required to plead the only material facts. Rule (2) of Order 6 of the C.P.C. lays down that every pleading shall only contain a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be but not the evidence by which they are required to be proved. The plaintiff or the party to the proceeding or a suit is required to plead material facts and is not required to plead or disclose material evidence nor the law. Principles contained in Order VI Rule 2 also apply to an Election Petition by virtue of Section 86 of the R.P. Act.

12. The petitioner has specifically pleaded in the present case that the elected candidate was employed as a Junior Engineer under the State of Maharashtra on the date of his nomination and continued to be so employed even on the date of presentation of the

Election Petition. He has also pleaded that the petitioner had tendered his resignation but the resignation was not accepted in view of pendency of a departmental enquiry against him and the petitioner continued to be in government service service. These facts pleaded, if proved, would amount to disqualification for being elected as a Member of Legislative Assembly under Article 191 of the Constitution of India which is also a ground for setting aside the election under clause (a) of Sub Section (1) of Section 100 of the Act. It was not necessary for the Petitioner to plead under what provision the election of the elected candidate is required to be set aside but that would amount to pleading the law. In my view, therefore, election petition cannot be dismissed summarily on the ground that the petitioner has not specifically pleaded that election of the elected candidate is required to be set aside under clause (a) of Sub Section 1 of Section 100 of the R. P. Act.

13. In my view, election petitions do disclose the cause of action . If the facts

pleaded in the election petition are proved they would constitute a ground of disqualification and a ground for setting aside the election. In the circumstances, the petition cannot be rejected under Order VII Rule 11 of the C.P.C.

14. Mr. Vashi, the learned counsel for the petitioner also urged that grounds mentioned in ground No. E and H of para 14 of E.P. No. 14 of 2004 are not germane and do not constitute a ground for setting aside of the election under the R.P. Act. In ground No. E and H, the petitioner has alleged that in some other Departmental Inquiry Rs. 7,713/- were ordered to be recovered from the elected candidate by way of fine/penalty. It is further alleged that the respondent had not paid the said penalty and was a defaulter to the tune of Rs.7,713/-. It is, therefore, urged that he was disqualified to contest the election.

15. Various laws relating to the election as Councillors of Municipalities and Municipal Corporations in the State of Maharashtra

provide that a person who is defaulter to the Municipality, or the Municipal Corporation shall not be entitled as a Councillor. Learned counsel for the petitioner,however, was unable to point out any provision from the R.P. Act or of any other law which disqualifies a person who is defaulter to the State Government from being elected as a Member of the Legislative Assembly. Neither the R. P. Act, 1951 nor the Conduct of Elections Rules, 1961 nor any other law was cited before me to show that being a defaulter was disqualification for being elected as a member of a Legislative Assembly. Therefore, the pleadings made in para E and H of para 14 of the Election Petition No. 14 of 2004 are not germane for the purpose of considering whether the elected candidate was disqualified for being elected or his election is liable to be set aside on that ground. The ground Nos. E and H in the Election Petition No. 14 of 2004 and ground No. E of para 11 of Election Petition No. 15 of 2004, therefore, are irrelevant and need to be struck of.

16. Accordingly the applicationsare partly allowed. Ground Nos. E and H in para 14 of the Election Petition No. 14 of 2004 and Ground No. E in para no.11 of E.P. No. 15 of 2004 are struck of from the Election Petition. Rest of the prayers in the applications are rejected.

[D.G.KARNIK, J]